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Supreme Court of the United States

OCTOBER TERM, 1966

No. 57

American Trucking Association, Inc., et al.,
Appellants,

v.

The Atchison, Topeka and Santa Fe
Railway Company, et al.;

No. 59

National Automobile Transporters Association
of Detroit, Michigan,
Appellant,

v.

The Atchison, Topeka and Santa Fe
Railway Company, et al.; and

No. 60

United States, et al.,
Appellants,

v.

The Atchison, Topeka and Santa Fe
Railway Company, et al.

Appeals from the United States District Court for the Northern District of Illinois

BRIEF FOR EASTERN RAILROAD APPELLEES.

INTRODUCTORY PARAGRAPH

These appellees do not disagree with Appellants'[1] briefs with respect to Opinions Below and Jurisdiction. However, there is an additional question presented by these appeals, and certain additional statutory provisions must be brought to the attention of the Court. Moreover, the statements contained in the two briefs present a somewhat distorted picture of the origins, growth, development and impact of trailer-on-flat-car service on the transportation scene.

QUESTIONS PRESENTED

In addition to the questions set forth by Appellants, these appeals raise this further question, whether the action of the Interstate Commerce Commission should be sustained on the basis of findings of fact and conclusions of law not relied on in the Commission's opinion.

STATUTES INVOLVED

In addition to the statutes specified at pages 2-3 of the Government's brief and page 2 of the motor carriers' brief, this case also involves Section 202(c), § 203(a)(10), § 203(a)(12), (13), (14), § 206(a)(1) and § 217(a) of the Interstate Commerce Act, 49 U.S.C. 302(c), 303(a)(10), 303(a)(12), (13), (14), 306(a)(1) and 317(a), which are printed in the Appendix, *infra*, pp. 46-50.

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[1] Joint briefs have been filed by the United States of America and the Interstate Commerce Commission, which document shall be referred to herein as "the Government" brief, and by the American Trucking Association, Inc., et al. and National Automobile Transporters Association, referred to herein as the "motor carriers'" brief. Where reference is made to the "Commission" it will be to the action of the Commission in this proceeding, rather than to its contentions jointly advanced on brief with the United States. The names of these appellees are listed in the appendix, *infra* p. 50.

STATEMENT

This case arises out of a general investigation by the Interstate Commerce Commission of what has come to be known variously as trailer-on-flat-car, TOFC or piggyback service.[2] While its recent development and expansion has been impressive, its origins occurred almost 125 years ago.

1. Background, Origin and Development of Early Piggyback Service.

In the 1840's a railroad began the practice of moving loaded canal boats on flat cars between certain points in Pennsylvania as a part of a Philadelphia-Pittsburgh rail water route. This operation lasted until the late 1850's but must be considered the seed of what has come to be regarded as the most significant recent development in transportation. Toward the end of the 19th century, another railroad operated so-called farmers' trains carrying four loaded produce wagons per freight car with the teams riding on the same train in box cars built expressly for that purpose.

The movement of actual highway trailers-on-flat-cars began over forty years ago, when, in 1926, a railroad published rates for the movement of 16 foot highway trailers between Chicago and Milwaukee. The first operation was an all-rail service in that it contemplated the transportation by railroad of freight tendered to it at railroad rates on railroad bills of lading in trailers provided by the railroad. (*Movement of Highway Trailers by Rail,* 293 I.C.C. 93, 94-95).

In 1936, by tariffs filed prior to the date on which the provisions of the Motor Carrier Act became effective, a railroad published a flat charge per loaded trailer, with related charges for the movement of empty trailers, for transportation of such trailers on flat cars between Chicago and St. Paul. While the primary purpose was to

[2] These terms are used interchangeably throughout.

induce use of the service by motor common carriers, it was contemplated that private shippers and freight forwarders (*Trucks on Flat Cars Between Chicago and Twin Cities,* 216 I.C.C. 435, 436-37) would also ship under the tariff. Almost immediately thereafter, there were published joint motor-rail-motor rates covering the same service which were subsequently approved by the Commission. (*Motor-Rail-Motor Traffic in East and Midwest,* 219 I.C.C. 245). In its decisions, the Commission noted the facts that the tariffs open to motor carriers were published prior to the effectiveness of the Motor Carrier Act, and that upon approval of the joint motor-rail-motor rates the open tariffs were to be withdrawn.[3]

In 1939 the Commission instituted a comprehensive investigation of the use by one mode of transportation of the facilities and services of another mode of transportation and laid down certain principles governing these operations. (*Substituted Freight Service,* 232 I.C.C. 683.) Subsequent decisions through the 1940's reaffirmed these basic principles.[4] Rail carriers continued to handle the trailers of private shippers under open tariffs and those of motor common carriers under voluntary through route arrangements entered into and published in accordance with the Commission's tariff rules and regulations (*Movement of Highway Trailers by Rail,* 293 I.C.C. 93, 96).

In late 1953, the Commission took note of a resurgence of interest in the movement of trailers-on-flat-cars and made interpretations of the Interstate Commerce Act concerning the relations, limitations and obligations incident to the transportation of highway trailers on railroad flat cars. (*Movement of Highway Trailers by Rail,* 293, I.C.C. 93).

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[3] See 216 I.C.C. 435, 437; 219 I.C.C. 245, 247-48.

[4] See *Greer Broker Application,* 23 M.C.C. 417 (1940); *Stone's Express, Inc. Common Carrier Application,* 32 M.C.C. 525 (1942); *Ringsby Truck Lines, Inc. v. Atchison, T. & S.F. Ry. Co.,* 263 I.C.C. 139 (1945); *Savage Application,* 265 I.C.C. 157 (1947); *Peninsula Truck Lines, Inc. v. Puget Sound Nav. Co.,* 292 I.C.C. 157 (1954).

In accordance with these and other decisions, the pattern of trailer-on-flat-car operations has evolved which permits only shippers to utilize tariffs, but not make through route arrangements, and allows connecting motor carriers to enter into through route arrangements, but not use tariffs.

Much has been said concerning the so-called five "plans" of piggyback. It should be noted immediately that these plan numbers in and of themselves have no legal significance, but are, in fact, simple shorthand terms for convenient conversation within the transportation industry. As far as can be known, the plan numbers do not appear in any tariff, divisional arrangement, or any other paper which sets forth the operative terms and conditions for any type of trailer-on-flat-car service. An understanding of the actual services and rates involved is essential to appreciate the nature, scope, and impact on the transportation scene of the various trailer-on-flat-car services now being provided. It is for this reason that it is especially dangerous and misleading to draw factual conclusions from extra record sources which have not been subjected to the test of a formalized proceeding whether through the traditional method of examination and cross examination or through the use of statements and reply statements.[5]

2. Background, Development and Growth of Modern Piggyback Service.

A. *Background.*

Shortly after the conclusion of World War II, the railroad industry began to experience a serious decline

[5] In this connection throughout the following description of the growth and development of modern piggyback, reference will be made to certain citations to material not contained in this record, not relied on by the Commission and indeed not even in existence at the time of the Commission proceeding, which materials are contained in the Government's brief. The inadequacy of such sources for the purpose for which used will be demonstrated. To do so, however, it will sometimes be necessary for these Appellees to use the same extra record materials. It is for this reason that they are contained herein.

in its participation in the intercity carriage of freight. By 1961, their participation had declined by over one hundred million ton miles and their percentage of the total intercity movement of freight had dropped from sixty-five percent to slightly under forty-three percent (R. 201). Numberless attempts by the railroads to improve their competitive position through the medium of rate adjustments and improvement in conventional box car service were largely unavailing (R. 217). Aggravating these conditions was the fact that much of the railroads' decline was caused by private and unregulated competitors which were actually threatening the continued existence of the common carrier transportation system in the United States. The Commission made note of the serious implication of this threat to all for-hire carriers in its annual reports (R. 195). Against this background of the sheer need to do something to survive, and the declaration by the Commission of governing principles concerning trailer-on-flat-car service in its 1954 decision, the railroads embarked on a tremendous expansion and development of piggyback service (322 I.C.C. 307).

B. *Development of the Present Plans of Service.*

Almost immediately after the Commission's decision in *Movement of Highway Trailers by Rail,* a number of the railroads began, or expanded what have come to be known as, Plan I and Plan II TOFC operations. The Pennsylvania Railroad, for example, started Plan II service in 1954 and handled approximately 15 thousand trailers the remainder of that year. By 1962, this total had grown to 55 thousand trailers. This plan generally contemplates a door-to-door service from and to shippers' plants within a railroad terminal area. A railroad publishes a tariff whereby it undertakes for a fixed rate to provide such complete service. A modification of Plan II has arisen which has come to be known as Plan II½, whereby the railroad provides all of the components of the service

except the pickup and/or delivery of the trailer to or from the shippers' premises. It is important to understand that while the railroads' rates for Plan II service contemplate the rendition of the complete service under the provisions of the railroad tariff, this does not mean that motor carriers do not "participate" in such service. The record clearly indicates that, even as to Plan II service, motor carriers do participate in such service under agreements with the railroad (R. 786-787).[6]

Since Plan II½ is the number which is used to describe tariff arrangements which do not include drayage to and from the shippers' premises, the motor carriers are free to compete for the motor carrier portion of the service, as is the railroad. Or the shipper may provide it himself. Under such an arrangement, the railroad does not and cannot control which company performs such drayage.

At almost the same time, a number of railroads began to enter into voluntary through route arrangements with motor carriers, substituting rail service for a portion of the motor carriers' line-haul service. This has come to be known as Plan I. It, too, has had a dramatic expansion, although it has always been characterized by peaks and valleys, since the motor carrier has the option as to whether it will interchange trailers under Plan I with its rail carrier partner, (R. 224); *Eastern Central Motor*

[6] In this connection, the alleged facts recited in note 9 on page 12 of the Government's brief are completely misleading, if not incorrect. First of all, the figures shown are not for the year 1965, but for the year 1964. The forty-two percent figure, shown on the first line of the footnote, is simply an addition of the totals for Plan II and Plan II½. It purports to be a figure representing the percentage of shipments in which the railroad performs the entire movement. Of course, as to Plan II½, the railroad does not perform the entire movement. The twenty-eight percent figure, which is allegedly the total of motor carrier participation in piggyback, is simply a total of the movements in Plan I and Plan V service. These, however, do not represent the only movements in which motor carriers participate. The record is clear that motor carriers also participate in the handling of trailers in connection with Plans II, III and IV (R. 338, 264, 387, 412-13, 466-67, 480-81, 503, 505, 515, 588, 589, 590, 786-87).

Carriers Association v. *B. & O.*, 314 I.C.C. 5, 19-20 (1961).[7]

Neither of these trailer-on-flat-car plans, however, was fully effective in stemming the tide of diversion of traffic away from the railroads. This was because neither of these efforts made any substantial dent in the constantly expanding field of private carriage. (R. 382, *Eastern Central Motor Carriers Association* v. *B. & O.*, 314 I.C.C. 5, 19-20). In order to recapture this highly desirable traffic being lost to private carriage, the railroads published rates for the ramp-to-ramp movement of trailers owned or leased by the shipper containing a certain mixture of freight-all-kinds. The publication met with immediate and vociferous opposition from virtually the entire motor carrier industry. The rates published in late 1958 were not finally removed from the cloud of litigation until late 1964.[8] The rates have been successful in

[7] In this connection, Government's attempt in footnote 8 on page 12, to show that Plan I is relatively less important to the Pennsylvania Railroad than are Plans II and III is also misleading. In the year covered, the Pennsylvania moved more trailers in Plan I than in any other single service. Comparing it with Plan III, held out to shippers, and which involves similar physical service, the Plan I arrangements exceeded Plan III by 15 thousand trailers annually and Plan II by 25 thousand trailers (R. 222). The Government's comparison is misleading because it combines the totals for two different rail services with the number of Plan I trailers which the motor carriers chose to interchange with the railroad. A proper comparison to illustrate the potential of Plan I would have to include the number of trailers which motor carriers might have interchanged with the Pennsylvania, but chose for some reason not to. That there are such reasons not caused by either the railroads' willingness to accept trailers or the total availability of traffic, is demonstrated by this record. (R. 358-59, 531; See 322 I.C.C. 381-83). That motor carriers enjoyed more business in 1965 cannot be denied. "The operations of motor carriers of property continued to expand in 1965. Operating revenues reached a new peak at $10.1 billion, an increase of 10.2 percent over the preceding year." I.C.C. 80th Ann. Rep. (1966) p. 58. In 1965 the total net income of Class I intercity motor carriers and Class I local motor carriers reached $226,038,668., an increase of $56,472,672., or 33⅓% over the year 1964. *Ibid.*, pp. 170-172.

[8] *Eastern Central Motor Carriers Association* v. *B. & O.*, 314 I.C.C. 5 *aff'd sub nom. Cooper-Jarrett Inc.* v. *United States.* 226 F. Supp. 318 (W.D. Mo. 1964), *aff'd* 379 U.S. 6 (1964). Indeed, the attack on the lawfulness of Plans III and IV continued in this proceeding where the motor carriers continued to urge that they were unlawful tariff publications. See 322 I.C.C. 370.

attracting large portions of traffic back to the rail carriers, much of it from unregulated private carriage (322 I.C.C. 307-08).

At the same time the so-called Plan III rates were published, additional rates for a service quite similar to Plan III were published, whereunder the shipper must also supply the flat car. These have come to be known as Plan IV rates.

Throughout this entire period, railroads and motor carriers have voluntarily entered into end-to-end and other through route arrangements by a joint rate applying only over that route. A number of railroads which have chosen not to enter into Plan I, have effectuated motor-rail coordination by this means (e.g., R. 773, 775, 776), which has come to be known as Plan V.

These developments in modern piggyback demonstrate that far from attempting to control the motor carrier portion of trailer-on-flat-car service, the railroads have established arrangements wherein a motor carrier is either an essential partner or is permitted to compete for the motor carrier portion of a less than complete service. The statement to the contrary on page 12 of the Government's brief, that piggyback was becoming predominantly a railroad service arises from a misapprehension of the facts. It also fails to recognize that the Commission has long held that trailer-on-flat-car service, even when performed door-to-door by a railroad, is railroad service subject to part I of the Act. See *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 101. This conclusion was reaffirmed in this very case.[9] The statements of the Government on pages 10 to 12 of its brief to show the pattern of railroad dominance of the motor carrier portion of piggyback are misleading to say the least. For example,

[9] See 322 I.C.C. at 343, where the Commission said: "In the *New Haven Case, supra*, it was found, properly, we think, that 'trailer-on-flat-car transportation' is in fact transportation by railroad', and that 'this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers' "

railroads are only able to provide shippers with a complete service without the assistance of motor carriers within terminal areas. They may do so because of a specific statutory exemption granted by Section 202(c) of the Interstate Commerce Act.[10] When a railroad wishes to publish rates for service to points outside a terminal area, it does so at the sufferance of a motor carrier willing to join the railroad in a through route arrangement. Similarly, the statement on page 12 of the Government's brief that railroads which offer Plan I wish to pick and choose, and that "the factors considered included the interest in preventing motor carrier piggyback rate competition with the railroads' own Plan II door-to-door service" gives somewhat less than a complete picture of the record herein. One railroad indicated this. The great number of the other railroads, which are participating in Plan I arrangements, do not list this as a factor, but indicate that their only considerations in the decision to join with a motor carrier in a TOFC arrangement, concern whether or not the motor carrier is authorized to perform the service, is financially stable or does not demand preferential treatment vis-a-vis other motor carriers. (R. 75, 91, 215, 225, 235, 240-41, 243, 257-58, 264, 577, 778, 780, 781, 782).

Thus, far from attempting to dominate trailer-on-flat-car service, the railroads have published arrangements which clearly expand the possibilities of motor carrier participation therein, even though what is involved is admittedly a railroad service.

3. The Commission and Lower Court Proceedings.

On June 29, 1962, the Commission, on its own motion, instituted a rule making proceeding encompassing every aspect of TOFC operations. The case was begun with a broad general statement that the authority for the proceeding consisted of the first four parts of the Interstate

[10] 49 U.S.C. 302(c).

Commerce Act and Section 4 of the Administrative Procedure Act. A prehearing conference was held on October 9, 1962, at which certain proposed rules were distributed, which rules are attached to the Commission's report in this proceeding as Appendix II (322 I.C.C. at 406, *et seq.*) No oral hearings were held but various written documents were filed by numerous parties. The two Examiners assigned to this proceeding served their report and order on August 23d, 1963, in which were contained the rules they recommended (R. 605-791). Exceptions and Replies thereto were filed by several parties and oral argument was held December 10 and 11, 1963. In its report dated March 16, 1964, the Commission, with Commissioners Hutchinson and Webb dissenting, adopted its own set of rules, which are attached to the Commission's report as Appendix IV (322 I.C.C. at 413, *et seq.*). In a brief formal order dated July 22, 1964, the Commission denied all petitions for reconsideration, including one filed by these appellees.

Included among the rules which the Commission adopted are rules designated 500.2 and 500.3 (322 I.C.C. 413), which for convenience herein are referred to as Rules 2 and 3. These rules represent a radical departure from the Commission's previous longstanding consistent interpretation of the Act. The Commission reinterpreted certain of its previous decisions and overruled a number of others in order to adopt Rules 2 and 3.

Shortly before the institution of the Commission proceeding, the Administration had sought legislation which would have specifically amended Section 2 of the Act to permit carriers to tender loaded or empty vessels or shipping containers to rail carriers.[11] The hearings, however, produced little or no support for the proposal, and it died in Committee. In stating that it did not have sufficient information on which to take an informed position on this

[11] See H. Doc. No. 384, 87th Cong., 2nd Sess. See also S. 3242, H.R. 11584, 87th Cong., 2nd Sess.; H.R. 4701, 88th Cong., 1st Sess.

legislation, the Commission recognized that its ramifications were far-reaching and could drastically affect basic and long-established relationships between carriers. Hearings on H.R. 4700 and H.R. 4701 before the House Committee on Interstate and Foreign Commerce, 88th Cong. 1st Sess. Pt. 1, p. 32. The motor carriers in the same hearings objected to this legislation because they stated it would dilute the position of motor carriers by forcing them into a behavior pattern which was basically shipper oriented, and that the proper solution should be one that would treat carriers as carriers. *Ibid.*, p. 212. Nevertheless, in this proceeding the Commission adopted rules which, in effect, treat carriers as shippers and do disturb basic long-established relationships between carriers.

After the denial of the petitions for reconsideration, appellee railroads and freight forwarders brought this action in the United States District Court for the Northern District of Illinois, Eastern Division, to set aside Rules 2 and 3. The District Court concluded that Rules 2 and 3 did exceed the Commission's authority and set them aside. On several related, but independent, grounds, the Court concluded that the rules were not authorized by any section of the Interstate Commerce Act, that they created conflicts with other sections of the Act, and that change in the Commission's prior longstanding and consistent interpretation of the Act to preclude carriers from acting as shippers was now solely within the province of the Congress (R. 41).

ARGUMENT

Introduction and Summary

At the outset, two significant concepts must be kept in mind in considering the issues involved in this proceeding. The first is that trailer-on-flat-car transportation is railroad service. The Commission so held in this pro-

ceeding. (322 I.C.C. at 343). The second is that what is being discussed in this case is not the transportation of a motor carrier's own property such as a trailerload of its own office furniture or supplies, but the tender by a motor carrier to a railroad of a trailer loaded with "traffic",[12] which has been tendered to the motor carrier by a shipper for movement under the motor-carrier's tariffs in its capacity as a federally franchised regulated carrier.

Both Appellants contend that in judging the railroads' duty to serve motor carriers only the physical operations can be considered. However, if this be the case, it must be recognized that the physical operations involved in the tender by a motor carrier in Plan III pursuant to Rules 2 and 3 and the physical operations involved under Plan I are identical. Yet, the Commission has held in this case that the latter operations result in a through motor-rail route under Section 216(c) of the Act. (322 I.C.C. at 342-43). The only difference between this and a tender by a motor carrier under an open tariff is that in Plan I the railroad and the motor carrier have voluntarily agreed to assume the status of connecting carriers. Under the open-tariff rules the railroad transportation is supplied not pursuant to a voluntary concurrence or agreement, but is compelled by the rules. Hence it must be concluded that Rules 2 and 3 result in compulsory through motor-rail routes. The Commission lacks statutory authority to compel such transportation.

The resolution of the issues in this case is not aided by statements to the effect that there is no specific statutory prohibition in so many words against a motor carrier becoming a shipper. The fact is that Section 216(e) pro-

[12] The Government recognizes the distinction between traffic and property on p. 37 of its brief. They fail to recognize the significance of the distinction, however, when they do not see that a trailer loaded with shipments tendered to it for transportation is not property of a motor carrier shipper, but the facility of a carrier handling its traffic in revenue service. *Cf. Louisville & N. R. Co. v. U. S.*, 282 U.S. 740, 754-55 (1931).

vides the exclusive method of coordinating rail and motor services. No one in the proceeding contends that the Commission has power under the Act to order motor-rail coordination either directly or indirectly. Hence, unless the arrangement can be said to be voluntary, it is not an arrangement in accord with the Commission's authority under Section 216(c).

On the other hand, if the relationship resulting from transportation compelled by Rules 2 and 3 is not one of carrier-carrier, but a shipper-carrier relationship, then the Rules have permitted transportation in violation of the forwarder permit section of the Act.[13] In short, the Commission's attempt to change the status of the motor carrier participant in transportation under these Rules from carrier to shipper and back to carrier again is not availing to avoid conflict with the Interstate Commerce Act.

Even if the other sections of the Act did not prevent a motor carrier from tendering its traffic to a railroad as a shipper, the exclusions from the prohibitions against discriminatory treatment contained in the Act, prevent those sections of the Act from becoming a statutory source of authority for the rules.

Nor does the National Transportation Policy compel any different result. The fact is that the Commission did not find that the National Transportation Policy justified Rules 2 and 3. It simply held that it did not prohibit them. The reason the Commission made no such findings is clear. There was no evidence to support them. The broad policy arguments newly advanced in Appellants' briefs are inadequate to support the Commission's adoption of Rules 2 and 3. Moreover, they are based on a lack of understanding of the facts or misapprehension of the law. In fact, if Section 2 of the Act is relied on as the source of authority for the rules, voluntary coordination in piggyback service may well be seriously retarded.

[13] Section 410(a); 49 U.S.C. 1010(a).

These considerations would compel affirmance of the district court's judgment setting aside Rules 2 and 3, if this were the first time this issue were raised. However, this is not the case. The Commission's longstanding consistent interpretation in several different cases, that the Act forbids a motor carrier from assuming the dual status of carrier and shipper, has reached the point where a change in that interpretation may come only after successful request to Congress to make it.

I

RULES 2 AND 3 RESULT IN THE ESTABLISHMENT OF COMPULSORY THROUGH MOTOR-RAIL ROUTES AND THE COMMISSION HAS NO AUTHORITY TO COMPEL SUCH ROUTES.

The Commission has consistently held that it has no authority to compel coordinated service between rail and motor carriers. In 1938, shortly after the passage of the Motor Carrier Act, the Commission indicated that it had no such power. It stated that such coordination could only be accomplished through the medium of through routes and joint rates and it had no power to require their establishment.[14] This Court has also taken this view of the Commission's power.[15] Thus, if what the Commission has accomplished by Rules 2 and 3 are compulsory motor-rail routes, the Rules are clearly beyond the Commission's power, and hence, must be set aside.

A comparison of the physical operations,[16] the tariff provisions and the Commission's own rules governing the transportation under Rules 2 and 3 with these same features of a Plan I movement, which the Commission holds

[14] *Kansas City S. Transport Co., Inc. Common Carrier Application*, 10 M.C.C. 221, 235-36 (1938).

[15] *I.C.C.* v. *Parker*, 326 U.S. 60, 72 (1945).

[16] This discussion assumes for ease of comparison a motor carrier's use of a so-called Plan III rate published by a railroad.

is a motor-rail through route (322 I.C.C. at 342-43), discloses not only a similarity but a virtual substantial identity.

The physical operation as to any particular trailer would be identical. The motor carrier would provide the trailer. It does in Plan I. The motor carrier would provide or arrange for the provision of the origin and destination drayage. Again this is the same in the Plan I through route arrangement.[17] The rail carrier would in both instances place the trailer on the car, provide the line-haul transportation and remove the trailer from the car.[18]

The tariff provisions by which the motor carriers would use rail open tariffs would also be virtually identical with those under which they join a railroad in a Plan I through route arrangement. In one case, the motor carrier would advise that rail service would be "utilized" and in the other that it would be "provided".[19] The tariffs would provide that the shipper pay a single rate for a movement that was partly by motor, partly by railroad and partly by motor again. The traffic would move over such a route. This is the classic example of a motor-rail-motor movement. (See 322 I.C.C. at 349-50).

Similarly, the rules which the Commission has adopted to govern open tariff transportation and through

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[17] See e.g., R. 786-87.

[18] This is not to say that there would be the same operational efficiency for the railroad in both instances. Because Plan I presupposes the advance agreement by the railroad, and concurrence in the interchange at specific named points, it is possible for the railroad to make advance plans to have sufficient terminal facilities and equipment to accommodate the movement smoothly. On the other hand, if a motor carrier may use open tariffs, it can "tender" its traffic without these advance arrangements at any of its authorized points, perhaps in large volumes with little or no notice. For example, a motor carrier which has never used a railroad might because of a snowstorm show up at a rail terminal with a hundred trailers to be moved. The resulting confusion and strain on facilities would work to the detriment of the railroad's regular customers and voluntary motor carrier partners.

[19] Cf. Rule 3(b) with Rule 4(b).

route service are virtually identical. The only difference is the omission of contract carriers from the through route rules. But this is because contract carriers may not enter into through route arrangements with common carriers. 322 I.C.C. at 350. Indeed the concern about contract carriers evidenced in this proceeding is somewhat mystifying, since in the landmark case of *Movement of Highway Trailers by Rail, supra* the Commission had permitted such carriers to tender traffic to railroads as agents for their shippers, to the extent that their contracts and status permitted such tender. 293 I.C.C. 93, 103-04, 108-09. In such case, of course, the rail carriers' responsibility would be directly to the shipper.

With respect to common carriers, the operative rules governing open-tariff and through-route transportation are virtually carbon copies one of the other. The tariff notice requirements are the same.[20] The rules governing tariff designation of interchange points, connecting carriers, and routes are all the same.[21] The rules impose the same limitation on where traffic may be interchanged.[22] The rule of thumb limitations with respect to how much circuity may be eliminated by use of an open tariff or under a rail-motor through route are contained in the same rule.[23]

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[20] Rules 3(b) and 4(b).

[21] Rules 3(d) and 4(c).

[22] Rules 3(e) and 4(d). In this connection, the limitation on a motor carrier's right to tender traffic to a railroad as a shipper is particularly interesting. The Commission cites no specific authority to impose such a limitation. If Section 2 of the Act (49 U.S.C. 2) requires a motor carrier to be treated the same as any other shipper, it would follow that a motor carrier has the right to tender traffic any place a railroad holds itself out to receive it. Indeed, the very imposition of these limitations indicates that the Commission must believe that, contrary to the assertions contained in the Government (p. 24, *et seq.*) and Motor Carrier (p. 28-29) briefs, something more than the physical character of the shipment must be viewed, in determining a motor carrier's right to be a "shipper". These limitations are based on the fact that a motor carrier has a different status than any other shipper.

[23] Rule 5(a).

It is clear that a motor carrier's use of a rail open-tariff to move its traffic produces transportation that has every characteristic of a through motor-rail route, except the railroad's voluntary concurrence.[24] But this is a fatal defect for it is only the voluntary through motor-rail route which Section 216(c) comprehends.

To overcome the obvious lack of authority it possessed to compel through motor-rail routes, the Government and the Motor Carriers both rely on the contention that transportation under Rules 2 and 3 cannot be a through route because the railroad does not voluntarily join in holding out a through service. (Govt. Brief 60-61; Motor Carrier Brief 31-33). The best answer to this argument can be found in the opinion of the District Court where it pointed out the logical fallacy in the argument when it said:

> "By verbal legerdemain, the rule against compulsory through routes thus would be read out of existence, since the logic of the argument carries the conclusion that whenever there is compulsion there is no through route." (R. 33)

It should be noted that this was not the basis for the Commission's decision. It quite frankly admitted that there would arise a *de facto* through route, but found that there would be no compulsion on either the motor carrier to use open tariffs or the railroads to publish any TOFC tariffs.

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[24] The Government (p. 62) and Motor Carrier (p. 32) assertions concerning differences in liability of the rail carrier are without significance. Even if the motor carrier could not claim against the railroad under Section 20(12) of the Act, it can claim under Section 20(11). Even the ultimate shipper whose traffic the motor carrier is hauling might claim against the railroad on the theory that it is the undisclosed principal on whose behalf its agent, the motor carrier tendered it to the railroad. See *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Acme Fast Freight*, 336 U.S. 465, 488 n. 27 (1949). See also *Thompson* v. *American Abrasive Metals Co.*, 253 S.W. 2d. 83 (Tex. Civ. App. 1952), *cert. den.* 346 U.S. 816 (1953). Similarly the motor carrier claim (p. 32) that there is a difference because the shipper can only veto the use of TOFC, but not demand it, is incorrect. In a Plan I through route the shipper's only right is to veto the service. Again Rules 2 and 3 and Plan I conditions are identical.

(322 I.C.C. at 334-35). The District Court characterized this finding as being "at odds with reality" (R. 33).

Indeed this is probably the most fanciful finding in the entire report. With respect to the motor carrier, it is true that it still does have a choice to use or not use the TOFC service. But, as a practical matter, the railroad's choice has been taken away. The rail carriers have been told that they either open their tariffs to, and thereby establish through routes with, motor carriers, or get out of the business entirely.

The finding that there is "no compulsion whatever . . . on rail carriers to hold out a TOFC service. . . ." also overlooks important provisions of the Interstate Commerce Act. This discussion would indicate that the rail carriers have complete freedom to decide whether or not they will ever hold out a trailer-on-flat-car service. Of course, this conclusion completely ignores Section 1(4) of the Act[25] which places an absolute duty on rail carriers to "furnish transportation upon reasonable request therefor . . ." and Section 6(1) which requires railroads to print, publish and file tariffs showing the rates and charges for such transportation. It is inconceivable at this stage of transportation history that, with equipment and facilities already in existence, no shipper at any location could make a "reasonable request" for trailer-on-flat-car service. But in order for the railroads to be free not to hold out such a service, this would have to be the existing factual situation. In short, the Commission's finding does place a compulsion on the rail carriers, which can be immediately seen if one is aware of the terms of the Act. The finding does result in compulsory through motor-rail routes.

From a common sense standpoint, the finding that Rules 2 and 3 involve no compulsion must rank among its most unrealistic in the Commission's 80 year history. Several analogies immediately spring to mind. On the same

[25] 49 U.S.C. § 1(4).

basis, one might conclude that the victim of a robbery who has turned over his purse to a brigand upon the threat, "your money or your life," has "voluntarily" surrendered his valuables. By the majority's logic, such act would have been voluntary, for the victim had a choice; he could have given up his life. Similarly, the majority would find no compulsion on either side in a situation in which a lawyer held a gun to a judge's head and told him to decide all the lawyer's cases in his favor. There would be no compulsion on the lawyer to submit any cases to that judge; the judge's decisions would be "voluntary" because he could always resign from the bench (or presumably kill himself), rather than submit to the lawyer's demands. The illogical nature of this conclusion would be extremely humorous, were the basic philosophy which underlies it not so frightening.

The fact is that Rules 2 and 3 do compel the railroads to enter into through routes with motor carriers, a result which the Commission presently has no power to effectuate. On this ground alone, the judgment of the District Court must be affirmed.

Moreover, Section 216(c) of the Act does not provide simply one method of coordinating motor rail service. It provides *the* way. A simple reading of this Section as well as Section 217(a)[26] shows two things with striking clarity. A motor carrier is authorized to file tariffs providing service between points on its own route and points on a route including a common carrier by railroad only when a through route has been established. As has been demonstrated, such a through route may only be established by the voluntary agreement of the parties thereto.

The exclusivity of Section 216(c) has already been tested in a case in which the forwarders, who could ship by tariff, contended for their right to enter into joint rates with carriers. They argued that there was nothing in the Act to prevent them from doing so. A District Court, in a

[26] 49 U.S.C. 317 (a).

learned opinion by Circuit Judge Augustus Hand, rejected the contention, stating the section set forth the circumstances under which joint rates could exist and its provisions were exclusive.[27]

II

THE COMMISSION'S RULES PERMIT MOTOR CARRIERS TO ACT AS FORWARDERS IN VIOLATION OF PART IV OF THE INTERSTATE COMMERCE ACT.

As already indicated, these Appellees submit that the Commission's rules create compulsory and therefore unauthorized through motor-rail routes. This is because the rules require railroads to enter into connecting carrier relationships with motor carriers acting in the guise of shippers. If, however, it be argued that the motor carrier is not a connecting carrier in an arrangement compelled by these rules, then it is a shipper. If this be the case, the Rules are unlawful because in violation of Part IV of the Act.

Section 410(a) of the Act[28] prohibits anyone from engaging in service subject to Part IV of the Act without a forwarder permit. Section 402(a)(7)[29] defines service subject to Part IV as service provided by a freight forwarder. Section 402(a)(5)[30] defines a forwarder as one who holds himself out to assemble and consolidate property, and break bulk and distribute it at destination, assume responsibility for such property from point of receipt to point of destination, and utilize for part of the transportation, the services, *inter alia,* of a Part I carrier

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[27] *Acme Fast Freight Inc.* v. *United States* 30 F. Supp 968, 973 (S. Dist. N.Y. 1940) *aff'd.* 309 U.S. 638 (1940).

[28] 49 U.S.C. 1010(a).

[29] 49 U.S.C. 1002(a)(7).

[30] 49 U.S.C. 1002(a)(5).

(a railroad). The section excludes from this definition one who performs these activities, as a carrier subject to part I, II or III of the Act. If, however, the motor carrier, tendering traffic to a railroad is acting, not as a carrier, but as a shipper, as authorized by Rules 2 and 3, then the Rules violate Part IV of the Act.

It should be noted that the exclusion from the definition relates not to the general status of the person, but his activity with respect to the particular transportation under review. It does not simply exclude Part I, II or III carriers. It excludes only those who are performing or holding out to perform the specified activities as carriers.

The legislative history of the section confirms that the clear language of the Section was so intended. In explanation of the exclusion the House Committee said:

> "The definition, it will be noted, does not include a person by reason of a holding out to transport or provide transportation 'as a carrier subject to part I, II, or III' of the Interstate Commerce Act. The purpose of this provision is primarily to avoid regulation, under Part IV, of the operations of express companies, which might otherwise have been considered to be included within the definition. It was deemed desirable to refer to the other carriers in order to clearly carry out the policy of not having part IV apply with respect to transportation performed by railroads, motor and water carriers in accordance with the applicable provisions of the Interstate Commerce Act." H. Rep. No. 1172, 77th Cong., 1st Sess., p. 6.

Of course, there are only two ways in which a motor carrier may perform, or hold out to provide, transportation in accordance with the provisions of the Act. One is to engage in operations on a public highway by motor vehicle,[31] and this does not include moving such a vehicle

[31] Section 206(a)(1) of the Act; 49 U.S.C. 306(a)(1).

over a railroad.[32] The only other method contemplated by Part II of the Act is for a motor carrier to join voluntarily with a willing rail, water, or express company partner in a through service over an intermodal route.[33] Indeed the definition of the "interstate commerce" to which Part II of the Act applies includes only these possibilities.[34]

In this connection it is extremely important to appreciate the difference between a lawful voluntary through motor-rail route under Part II and an unlawful compelled through route. It is the failure to comprehend this distinction which undoubtedly accounts for the Government's statement that the railroads do not join in the argument that the rules violate Part IV of the Act.[35] These railroad appellees have from the beginning of this case, and indeed from the first time the Commission suggested the possibility of open-tariff use in its notice of oral argument, pointed out the extremely important difference between the two situations. The difference is that Plan I is a lawful through route joint-rate arrangement because the railroad has voluntarily agreed to the arrangement. The open-tariff arrangement is not lawful because the Commission is attempting to substitute the compulsion of the Rules for the voluntary concurrence of the railroad.

When the railroad has given such concurrence, a motor carrier interchanges a trailer with a railroad as a "connecting carrier", and thus the argument has no merit

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[32] Section 203(a)(12), (13), (14) of the Act; 49 U.S.C. 303(a)(12), (13), (14).

[33] Section 216(c) of the Act; 49 U.S.C. 316(c).

[34] Section 203(a)(10); 49 U.S.C. 303(a)(10).

[35] Government Brief, p. 63, n. 40. Admittedly, these appellees submit that the Court need not reach the question if it concludes that the Rules result in compulsory and hence, unlawful through routes. The argument must be advanced, however, because both the Commission and the Government, at various stages of this proceeding, have, in answering the arguments of the parties, changed the motor carrier's identity, like Achelous, from carrier to shipper to carrier, depending on which conflict with the Act they were attempting to evade.

because of the specific exclusion in the definition of a freight forwarder in Section 402(a)(5) of one which performs its activities as a carrier. But if the railroad has not given such a concurrence, and the motor carrier tenders a trailer "as a shipper" and not a "connecting carrier", the exclusion does not apply. Then the argument that the motor carrier would be unlawfully operating as a forwarder without a permit is not only meritorious but alternatively conclusive.

The significant item that the Commission overlooked in its Report[36] and the Government continues to ignore in its Brief, is that, with the voluntary concurrence of the railroad, a substituted service arrangement is perfectly lawful, permitted by Congress and contemplated under Section 216(c) of the Act. Without that concurrence the arrangement is unlawful, either in violation of Section 216(c) or Section 410(a).

III

NEITHER SECTION 2 OF THE ACT, THE NATIONAL TRANSPORTATION POLICY NOR OTHER POLICY REASONS AUTHORIZE THE IMPOSITION OF RULES 2 AND 3.

1. *Section 2 Of The Act Does Not Authorize Rules 2 and 3 and Is Immaterial Since A Motor Carrier Cannot Become a Shipper of Its Traffic Entitled to the Protection of Section 2.*

The only section of the Interstate Commerce Act mentioned by the Commission in support of its adoption of Rules 2 and 3 is Section 2. Accordingly, other sections of the Act now advanced by counsel seeking to defend the

[36] The Commission only discussed this argument in connection with the contention that the Plan I through route arrangement was unlawful. Of course, having concluded that under such an arrangement, the parties were acting as connecting carrier partners to a through route, the exclusion from the definition became operative and overcame the argument. See 322 I.C.C. at 347.

Commission's order are unavailing, since the action of an administrative agency must be measured against the grounds invoked by the agency.[37]

However, Section 2 provides no authority for the Rules. None of the cases cited by Appellants contradicts this conclusion. None of those cases deals with a situation where a federally regulated carrier is attempting to ship via another mode in order to carry out its undertaking as a carrier. For example, *Louisville & N. R. Co.* v. *United States,* 282 U.S. 740 (1931), cited by both the Government and the Motor Carriers was one of the few cases cited by the Commission in this portion of its report in support of the Rules. But far from supporting Appellants, the case contains a recognition of the distinction to be made between a carrier tendering its own property for shipment, and a carrier handling another's equipment for revenue purposes in a connecting line movement. See 282 U.S. 740, 754-55.

The only case cited by Appellants which is even remotely similar to the issues here involved is *I.C.C.* v. *Delaware L. & W. RR.,* 220 U.S. 235 (1911). That case involved attempted discrimination in rates against the forwarders. The Court ultimately forbade discrimination in charges "upon the mere circumstance that the shipper is or is not the real owner of the goods." 220 U.S. at 252. However, certain things must be noted about this case. First of all it was decided prior to the enactment of Part IV of the Act. At that time a forwarder had no federally regulated status as a "carrier" and, of course, could be a

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[37] *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168-69 (1962); *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80, 94 (1943). In this regard the parties' resort to Section 1(4) is particularly interesting. It is this section which imposes the duty on a railroad to enter into through routes with other railroads and water carriers subject to Part III. Motor carriers are not mentioned. If this section be given the meaning hinted at by Appellants here, the first duty imposed by the section would make the remainder surplusage. It would also make Section 3(4) of the Act needless verbiage.

shipper.[38] There could be no inconsistency or repugnancy in a forwarder having this dual status. Moreover, forwarders have traditionally occupied this dual position, and Congress in enacting Part IV of the Act recognized their "unique" position in this regard, as indicated by the legislative history.[39] By the same token, in refusing to permit regulated carriers to engage directly in forwarder operations, it is clear that Congress did not intend to permit other carriers to carry on this dual role of carrier and shipper.[40]

Section 2 must be read *in pari materia* with Section 3(1) of the Act. The latter actually governs discrimination in service as contrasted with Section 2 which covers only discrimination in charges. However, Section 3(1) does not apply to the "traffic"[41] of other carriers and hence motor carriers are not entitled to the protection of these sections when attempting to tender freight which they have received for transportation in their capacity as carriers.

Other appellees will deal with this issue in some detail so there is no need to burden the Court with lengthy repetition. Sufficeth it to say that to the extent a motor carrier can lawfully become a shipper of its property, it would

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[38] As could a motor carrier. In this very decision the Commission recognized the import of this factor when it said (322 I.C.C. at 338): "Prior to August 1935, when part II of the Interstate Commerce Act became law, the motor carrier industry was not subject to Federal regulation and such carriers, *therefore*, could utilize the services of railroads as could any shipper. *Trucks on Flat Cars Between Chicago and Twin Cities*, 216 I.C.C. 435." (Emphasis Supplied). That this is the significance of the cited case can be seen from the emphasized word.

[39] See H. Rep. No. 1172, 77th Cong., 1st Sess., p. 1.

[40] *Ibid.*, p. 15. "The provisions of this subsection [Section 411(c)], as well as those of section 410(c), are intended to carry out the policy of permitting . . . [Part I, II or III] carriers to engage in freight forwarding indirectly, through control of subsidiary corporations, but of not permitting them to engage directly in the freight-forwarding business."

[41] As distinguished from their own property; the Government brief acknowledges the difference at p. 37.

be entitled to the protection of Section 2. As to its "traffic", however, it is not entitled to this protection.

This interpretation of Section 2 avoids conflict with other sections of the Act. See pp. 15-24, *supra*.

The cases cited by the Government compel no different result. Those cases simply hold that a rail carrier may not discriminate against one shipper and in favor of another because there is competition for the latter shipper's business and not for the former's business. This has nothing to do with whether or not a carrier can discriminate against a competitor. If Section 2 covered this matter, there would have been no reason for the enactment, for example, of Section 3(4) of the Act.[42]

The fact is, of course, that the question is not whether a railroad can discriminate against a competitor, but whether or not that competitor can lawfully be a shipper entitled to the protection of Section 2. To the extent that his federally franchised, regulated status as a carrier prevents him from lawfully becoming a shipper, the provisions of Section 2 become irrelevant.

2. *Neither The National Transportation Policy Nor Other Newly Advanced Policy Reasons Support The Adoption of Rules 2 and 3.*

In adopting Rules 2 and 3, the Commission did not rely on the mandate of the National Transportation Policy. In fact, the only thing the Commission held with respect to the Policy was that it did not of itself bar the Rules (322 I.C.C. at 329-30).

Of course, the Policy alone could not provide support for the rules since it is merely an interpretive aid, and does not give the Commission a roving mandate to prescribe what it thinks is good for the carriers. The Commission has in the past recognized this. In a case posing somewhat similar questions as the instant one, *Strickroot*

[42] 49 U.S.C. § 3(4).

v. *Detroit & Cleveland Navigation Co.*, 253 I.C.C. 535 (1942), the Commission denied the request of a motor carrier that a water carrier be required to join with it in the establishment of through routes by saying at 537-38:

> "We are without authority under either part II or part III of the act to require defendant to join with complainant in the establishment of through routes and joint rates on this traffic. The provisions of section 216(c) of part II and of section 305(b) of part III of the act in respect of the establishment of through routes and joint rates between common carriers of property by motor vehicle and common carriers of property by water are permissive, not mandatory. . . . In his exceptions, complainant by inference contends that we have such authority under the declaration of national transportation policy in the act, as amended, to the effect that there shall be fair and impartial regulation of all modes of transportation which will preserve the inherent advantages of each without unfair or destructive competitive practices. We do not agree that the declaration of policy indicates that the provisions of sections 216(c) and 305(b) have any different meaning or purpose than that here given them. We are not clothed with substantive power other than that given by the substantive provisions of the act."

United States v. *Pennsylvania R. Co.*, 323 U.S. 612 (1945) does not indicate that the policy or some vague rule of equality will substitute for statutory authority for Commission action. While there need not be specific *language* there must be some section or sections of the Act which provide the authority. In the last cited case, the Court was able to ascertain such authority pointing to specific sections which provided it. See 323 U.S. 612, 619.

The other policy arguments advanced by both the Government and the Motor Carriers seem to be nothing more than the cry that the scheme of the Interstate Commerce Act itself is anti-competitive. Of course, such complaints should more appropriately be directed to Congress, rather than to this Court.[43]

Appellants' basic complaint is that railroads can provide door-to-door piggyback and motor carriers cannot. Since piggyback is transportation by railroad,[44] this should not be surprising. The ability to provide the over-the-street movement in conjunction with the rail transportation results from a specific authorization in the Act, viz., Section 202(c) thereof. Moreover, it must be remembered that this ability of a railroad is limited to shipments originating *and* destined within the railroad's terminal area. Beyond these limits, the railroad must find a motor carrier willing to join it in a through route arrangement, or it cannot provide door-to-door transportation.

The complaint that a railroad may join some motor carriers in through routes and not others is another quarrel with the provisions of the statute. It is simply a statement of dissatisfaction with Section 216(c) of the Act which permits through motor-rail routes but does not give the Commission the power to compel them.

The attempt to show that this "anti-competitive scheme" is harming the motor carriers founders on the

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[43] See *American Trucking Associations* v. *United States*, 364 U.S. 1, 15 (1960):

> "Appellees say that these safeguards are no longer needed, because independent trucking is no longer an 'infant industry'. This is an immaterial argument in this forum. We do not condemn the wisdom of the Commission's action. We simply say the transportation legislation does, and that the pardoning power in this case belongs to Congress."

The cited case involved an attempt by railroads to justify a broader incursion into the motor carrier field with the argument that changed conditions warranted lesser restrictions on rail affiliated motor carriers.

[44] 322 I.C.C. at 343; *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 101 (1954).

facts. It is based on the mistaken understanding of statistics relating to movements under certain Plans of TOFC, and the consequent invalid conclusion that these figures measure the extent of motor carrier participation in piggyback.[45] As indicated above, the figures do not measure that participation (See Statement, *supra*, pp. 6-10), and even if they did, the relevant forum in which to advance these persuasions would be the Congress.

Even the hypothetical speculations[46] concerning the great harm which may result without Rules 2 and 3 are unavailing. They simply mean that a railroad may be able, with efficient, economical service, at a price which must be just, reasonable, non-prejudicial and not competitively destructive, to attract some traffic to its lines.

Actually, if one wishes to hypothesize, greater harm to the future of TOFC can be envisioned if Rules 2 and 3 are imposed under the authority of Section 2 of the Act. These Appellees are the most substantial participants in voluntary through motor-rail routes with innumerable motor carrier partners. For many of them, this type of arrangement provides as large or larger volume than any of their other TOFC services.[47] The divisions which these rail carriers receive are lower than the published Plan III rates available to shippers for the same quantum of service.[48] If Section 2 means that only the physical operations must be considered in determining whether or not a railroad is discriminating between shippers and motor carriers, then these railroads would be compelled to fix the same level of charges for both. Since it is unlikely that rail carriers would wish to concede that the past

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[45] E.g., Government Brief, p. 44.

[46] Government Brief, p. 40-41.

[47] R. 221, 222, 577.

[48] R. 382, 584, 593. The New Haven, for example, receives systemwide an average of $48.12 per trailer in Plan I divisions; its Plan III traffic on the same basis averages $70.77 per trailer. R. 220-21.

Plan III rate level was too high, they would undoubtedly raise the Plan I divisions. This would almost certainly retard the future development of this form of coordination, if, indeed, it did not reduce the present level of cooperation.

In attempting to overcome this impact of the application of Section 2 to authorize Rules 2 and 3, the Government (Brief, pp. 62-63, n. 39) simply retreats from its previously asserted position that only the physical characteristics of the shipment may be examined in determining whether a difference in treatment is warranted (Brief, pp. 24, *et seq.*). Having contended that the motor carrier's status as a carrier makes no difference in connection with the anti-discrimination provisions of the statute, the Government relies on that status to avoid the deleterious results which will flow from the use of Section 2 as a source of authority for Rules 2 and 3.

Finally, it must be recognized that the so-called policy reasons for adopting the rules represent the speculations of appellate counsel. They are not based on any findings by the Commission, nor did the Commission state them as the grounds on which it acted. Hence, even if accurate, they would not support judicial approval of Rules 2 and 3. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-69 (1962).

IV

THE COMMISSION'S LONGSTANDING CONSISTENT INTERPRETATION OF THE ACT TO THE EFFECT THAT MOTOR CARRIERS MAY NOT ACT AS SHIPPERS CAN NOW ONLY BE CHANGED BY CONGRESS AND THUS RULES 2 AND 3 EXCEED THE COMMISSION'S POWER.

Assertions concerning the effect of administrative interpretations of a statute and later legislative action or inaction have been stated, restated, applied and misapplied

for at least the last sixty years. The doctrine is sometimes set forth in an unqualified fashion, but on other occasions is stated with limitations.[49] In the instant proceeding, however, by any measure or standard, it is clear that the Commission erred in attempting to reverse its longstanding and consistent interpretation of the Interstate Commerce Act to prevent motor carriers from acting as shippers by rail.

In *New Haven RR. Co.* v. *Interstate Commerce Commission,* 200 U.S. 361 (1906), perhaps the earliest, and certainly one of the leading cases in the area, this Court said, at 401-02:

> ". . . a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute."

It will be immediately noted that an obvious qualification to the doctrine is that the original interpretation not be plainly erroneous. In the instant case even the Commission, in refusing to follow its previous longstanding interpretation of the Act, conceded that that original interpretation was not plainly erroneous. In discussing and later rejecting the interpretation, the majority said:

> "We are now of the opinion, however, that these decisions, [holding that a motor carrier could not act as a shipper] *although we do not doubt that when made they represented sound conclusions,* are incorrect in the light of this record and current conditions." (322 I.C.C. at 334) (Emphasis supplied)

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[49] See generally Davis, *Administrative Law Treatise,* §§ 5.06, 5.07 (West Pub. Co., 1958).

Another element of the doctrine is that the interpretation has been impliedly sanctioned by the reenactment of the statute without alteration. Such sanction has been found at times by mere silence on the part of Congress, but the doctrine has especial force where specific bills to overcome the interpretation have been introduced, but not enacted. It is said that great weight must be given the contemporaneous construction of an act of Congress by an agency charged with its supervision, which interpretation has been followed by agencies of government, and has been acquiesced in by congressional failure to pass bills introduced to repeal the administrative interpretation. *U. S.* v. *Bergh,* 352 U.S. 40 (1956). A more recent administrative interpretation of a statute cannot prevail against a prior longstanding, consistent interpretation, particularly where Congress has not only impliedly through silence but expressly through refusal to enact laws changing the original interpretation acquiesced in that original interpretation. *U.S.* v. *Leslie Salt Company,* 350 U.S. 383, 396-97 (1956).[50]

With respect to the interpretation of the Act to the effect that a motor carrier may not assume the dual role of shipper and carrier, it can be seen that it meets every qualification of the doctrine that requires such interpretation to be read into the statute. As indicated above, it was not plainly erroneous when made. Secondly, it was made shortly after the passage of the Motor Carrier Act, which for the first time gave for-hire motor carriers the status of federally regulated carriers. The members of the Com-

[50] A clear and succinct statement of this doctrine can be found in *Atchison, Topeka and Santa Fe Railway Company v. U. S.,* 209 F. Supp. 35 (N.D. Ill., 1962) where the Court said, at 41-42:

> "Finally, the Commission here for the first time has adopted a view that is antagonistic to the construction which it had followed for the previous seventy years of its lifetime. In such a case the new interpretation is entitled to no weight as an administrative determination." (Citing *U. S. v. Leslie Salt*)

mission who participated in the decision in *Substituted Freight Service,* 232 I.C.C. 683 (1939), which contained the interpretation, were largely those who had participated in the Congressional procedures leading up to the enactment of the Motor Carrier Act.[51]

Because both the Commission's report and the Appellants' briefs state the history and holding of that decision in a somewhat unclear fashion, it may be well to review the proceeding in detail, comparing it with the Commission's attempt in the present case to restate that previous interpretation. This decision was rendered shortly after the passage of the Motor Carrier Act and was by its very terms a general investigation into the use of substituted motor for rail, or rail for motor service. This case clearly held that one could not act as a motor common carrier and a shipper by rail as to the same shipment. Such a situation was said to be "repugnant to the Act." Here, the Commission attempted to distinguish that decision. It stated that the clear holding in that proceeding must be considered in view of the ultimate nature of the findings therein, and indicated that the holding that a motor carrier could not perform a coordinated service through the use of a railroad open tariff was probably not "necessary to the determination of the case." (322 I.C.C. at 332)[52] The majority stated that the ultimate findings of the Commission in *Substituted Freight Service* were of a limited nature, viz., that "service substituted for common carriage must itself be common carriage and that the tariff publications

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[51] See Hearings Before the Committee on Interstate Commerce, U.S. Senate 74th Cong., 1st Sess., on S. 1629, p. 115:

"THE CHAIRMAN. Yes; and I might say that I claim no pride of authorship of these bills. These are bills suggested by the Commission and by the Coordinator, and I introduced them as chairman of this committee."

Commissioner Eastman who was the "Coordinator" was a member of the majority in *Substituted Freight Service.*

[52] Similarly the Appellants in their briefs constantly refer to this statement of principle as a dictum.

allowed under the special permissions were legally insufficient ... ." The majority continued that the prohibition against a motor carrier acting as a shipper was solely because the motor carrier was not giving proper notice in its tariffs that it might substitute rail service. This is absolutely and completely wrong.

One of the ultimate conclusions in the *Substituted Freight Service* was as follows:

> "3. The furnishing of the so-called substituted service without setting forth the service, the routes over which it is performed, and the parties performing same in *lawfully filed tariffs* is in contravention of sections 216-217 and our regulations thereunder, including rule 31 and section 2 of Tariff Circular 20." (Emphasis supplied).[53]

Two things must be noted about this ultimate conclusion. The first is the reference to Rule 31 of Tariff Circular 20 which at that time provided in part as follows:

> "Where it is desired to establish arrangements for through transportation with motor carriers, joint rates in accordance with the provisions of section 216(c) of Part II of the Interstate Commerce Act and of the regulations applicable to joint rail-motor rates as provided in section 2 of this Circular as amended, should be established."[54]

In short, it may be noted that the Commission in *Substituted Freight Service* did not say that a motor carrier could act as a shipper provided it gave notice in its tariffs. It said that, if a motor carrier and railroad wished to make through arrangements for joint motor-rail service, they had to follow the provisions of section 216(c) of the Act. Hence, the finding that a motor carrier could

[53] 232 I.C.C. at 691.

[54] See 232 I.C.C. 685.

not act as a shipper, and use an open-rail tariff to construct a joint motor-rail service *was* necessary to the ultimate determination in the proceeding.

Secondly, it should be noted that the Commission did not simply say in *Substituted Freight Service* that notice of a possible substitution of service in some kind of tariff was all that was necessary to effectuate a joint motor-rail service. The Commission said that such information had to be given in "lawfully filed tariffs." Earlier in the *Substituted Freight Service* decision the Commission had stated (232 I.C.C. at 689):

> "If publication is made in the applicable rate tariff, the latter should show appropriate concurrences of the motor carriers performing the substituted service. If publication takes place in the form of a directory, the latter should be published with appropriate concurrences of the rail and motor carriers listed therein, and the rate tariffs should contain concurrences of the motor carriers and appropriate reference by I.C.C. number to the directory."

It can be seen that the Commission was pointing out that one of the requirements of a substituted service arrangement was a list of the *concurrences* of the carriers involved. A concurrence is, of course, an agreement or an approval of the arrangement being entered into. If a motor carrier could act as a shipper and use a railroad's open tariff, there would be no need to either publish, or indeed, secure the concurrence of any rail carrier, since a rail carrier *must* accept shipments tendered in conformity with its tariffs to the extent that the shipper may lawfully act as a shipper.

At 322 I.C.C. 333, the Commission bolsters its present novel interpretation of *Substituted Freight Service, supra,* by stating that the Commission in that case did not intend to proscribe the type of substituted service arrangement

originally intended by the parties involved in *Trucks on Flat Cars Between Chicago and Twin Cities,* 216 I.C.C. 435 (1936). It states that in *Substituted Freight Service* the language was directed at the use of an open TOFC service by a carrier not acting in its proper role of carrier, but acting instead as a shipper or forwarder. It then states that if the carrier utilizing the substituted service gives proper notice in its own tariffs of that use, there is nothing to prevent it from using another mode's tariffs. The incredible thing about this statement is that six pages later (322 I.C.C. 339), in discussing joint intermodal TOFC service, the Commission, in this very case, cites with approval an earlier finding that the status of a motor carrier substituting the service of a rail carrier is that of a connecting carrier. The case cited is *Motor-Rail-Motor Traffic in East and Midwest,* 219 I.C.C. 245 (1936). In that case, the Commission rejected the argument that a motor carrier, substituting rail service, would be in the position of a shipper.[55]

Moreover, and this is equally amazing, immediately before this discussion, the Commission report in the instant case recognized that the basis for the decision in *Trucks on Flat Cars Between Chicago and Twin Cities, supra,* was that motor carriers were not then subject to Federal regulation as "carriers", and thus could utilize the services of railroads as "shippers". The Commission stated (322 I.C.C. at 338):

> "Prior to August 1935, when part II of the Interstate Commerce Act became law, the motor carrier industry was not subject to Federal regulation and such carriers, *therefore,* could utilize the services of railroads as could any shipper. *Trucks on Flat Cars Between Chicago and Twin Cities,* 216 I.C.C. 435." (Emphasis supplied)

[55] See 219 I.C.C. 245, 274.

The Commission cannot justify its conclusions in this matter. Nevertheless, in what appears to be an attempt to give some aura of respect to its interpretation of *Substituted Freight Service,* the Commission stated that nowhere in the *Substituted Service* case did the Commission specifically overrule, or attempt to distinguish *Trucks on Flat Cars Between Chicago and Twin Cities, supra.*[56] It conceded further on in its report that certain of its later decisions followed a contrary interpretation of *Substituted Freight Service.* In *Movement of Highway Trailers by Rail,* 293 I.C.C. 93, (1954), however, the Commission had no doubt about the effect of *Substituted Freight Service* on its earlier decision in *Trucks on Flat Cars.* At 293 I.C.C. 104-105, the Commission said:

> "Question 4.—Under the conditions stated in question 3, may a railroad transport such trailers if the prior and/or subsequent highway movement is by a common carrier by motor vehicle? If so, to what extent must the railroad ascertain and be subject to the limitations in the motor common carrier's certificate as to (a) territory and (b) commodities?
>
> "This question, like number 3, is to be answered against the background of an *open tariff published by the railroad naming rates open to the general public and applicable on freight-laden highway trailers to be*

[56] The Commission ignored the fact that in *Substituted Freight Service,* 232 I.C.C. 683 (1939), the Commission in note 2 on page 690 referred to its earlier decision in *Trucks on Flat Cars,* but pointed out that joint motor-rail-motor rates were subsequently filed covering this same service and found justified in *Motor-Rail-Motor Traffic in East and Midwest.* This is a substantial indication that the approval in *Trucks on Flat Cars* was based on the fact that motor carriers were not then federally regulated and that once they were, the way in which they could coordinate service with railroads was under § 216(c) with joint rates and through routes. Thus, the Government's assertion (p. 55, Government brief) that in *Substituted Freight Service* no reference was made to the Commission's contrary holding in *Trucks on Flat Cars Between Chicago and Twin Cities,* supra, is simply incorrect.

transported by the railroad on flatcars. In *Trucks on Flat Cars between Chicago and Twin Cities, supra,* we found such an arrangement to be lawful. The motor carrier was said to have the status of a common carrier as to the entire haul and the status of a shipper as to that portion of it performed by the railroad.

"Three years later, in *Substituted Freight Service,* 232 I.C.C. 683, 690, *we again adverted to this principle and rejected it,* observing that for the motor carrier to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is repugnant to the act. See also *Motor-Rail-Motor Traffic in East and Midwest, supra,* page 274. The view so stated is obviously sound. It follows, therefore, that if the railroad is on notice that trailers tendered it in this manner are being operated in common-carrier service subject to part II of the act, it should not thus knowingly join with the motor common carrier in a violation of the law. *It should be understood that what has just been said refers only to traffic moving by rail under an open tariff and in the absence of a through-route arrangement between the connecting carriers."* (Emphasis supplied)

In the instant case, as shown above, the majority attempted to temper the effect of the clear holding in *Substituted Freight Service* by stating that there the emphasis was placed upon proper publication and notice to the public, "and that there is no requirement that what is called a 'joint service' can only be performed under joint rates and not pursuant to a properly published substitution arrangement using the open-tariff rates of the underlying carrier."[57] Aside from the fact that this

[57] 322 I.C.C. at 334.

conclusion is completely inconsistent with the Commission's later holding in this case that a substituted rail for motor service is a joint-rate through-route arrangement,[58] the statement completely ignores the fact that in *Movement of Highway Trailers by Rail, supra,* the Commission, two pages after stating that a motor carrier could not act as a shipper, discusses at some length the publication requirements for a substituted service arrangement as a lawful joint rate and through route, 293 I.C.C. 93, 106-107 (1954). In short, for the Commission now to say that the prior holdings that a motor carrier could not act as a shipper were simply because of a failure to meet certain publication requirements, implies that the Commission, in *Movement of Highway Trailers by Rail,* stated the prohibition on one page, but did not see the need to relate it to the publication requirements discussed two pages later.

Indeed the Commission specifically limited the prohibition to the situation where a motor carrier was attempting to act as a shipper.[59] In other words, the Commission clearly distinguished and forbade a motor carrier's use of rail TOFC service as a shipper, but recognized such use was permissible under a lawfully published through-route arrangement.

Congress reenacted the Motor Carrier Act of 1935 as Part II of the Interstate Commerce Act in 1940. No change was made in the interpretation of the Act in *Substituted Freight Service.* Indeed the interpretation prevailed for

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[58] "There thus came into existence two fundamental types of coordinated motor-rail piggyback services and arrangements, both of which have been sanctioned by this Commission as lawful joint-rate and through-route arrangements. One form of operation—which has come to be known as plan I TOFC service—provides for the 'substitution' of rail for motor service at rates which are the equivalent of corresponding all-highway rates published by the participating motor carrier." (322 I.C.C. 301, 342 (1964).

[59] "It should be understood that what has just been said refers only to traffic moving by rail under an open tariff and in the absence of a through-route arrangement between the connecting carriers." 293 I.C.C. 93, 105.

approximately the next twenty-five years. It was constantly repeated in subsequent decisions governing many different aspects of rail-motor transportation. In *Greer Broker Application*, 23 M.C.C. 417 (1940) a motor carrier filed an application for a broker's license to cover the arrangement of transportation by motor vehicle of oilfield equipment and supplies. The applicant owned four trucks, which he used in his own common carrier operations, but turned certain of the traffic over to other motor common carriers under their published tariffs. In holding that the activities considered were not those contemplated by the brokerage provisions of the Act the Commission discussed its previous decision in *Substituted Freight Service* and stated that the practice of a motor carrier accepting traffic for transportation from origin to destination as a common carrier, and then turning the traffic over for a portion of the route to a rail carrier under its tariffs, was repugnant to the Act. The Commission continued in the *Greer* decision by citing seven specific sections of the act which gave rise to the repugnancy, and concluded that the practice of the applicant disclosed in this proceeding could not be approved for reasons similar to those set forth in *Substituted Freight Service*.[60]

The next case in the Commission's long line of consistent interpretations of the Act was *Stones Express, Inc. Common Carrier Application*, 32 M.C.C. 525 (1942). That proceeding involved a grandfather application for a certificate of convenience as a general commodity common carrier. Applicant had been in part utilizing underlying rail service at published rates in substitution for over-the-road vehicle service. The Commission specifically stated that if the applicant desired to continue such operations it would have to bring them into conformity with the

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[60] 23 M.C.C. at 420. Interestingly, but mysteriously, the Commission in the instant proceeding cites *Greer* as consistent with its present interpretation of *Substituted Freight Service*. See 322 I.C.C. at 334.

tariff provisions of the Act in accordance with the views expressed in *Substituted Freight Service.*[61]

Three years after the decision in *Stones Express* the Commission reiterated its position that a motor carrier could not act as a carrier and shipper at the same time with respect to the same shipment. *Ringsby Truck Lines, Inc.* v. *Atchison, Topeka and Sante Fe Railway Co.*, 263 I.C.C. 139 (1945) involved a complaint by a motor common carrier that certain railroads were violating Section 1(4) of the Act and the National Transportation Policy by refusing to establish rates for the transportation of motor carrier freight on flat cars between Chicago, Illinois and Denver and Los Angeles. Complainant wanted rates set for its use in hauling its own less-than-truckload traffic instead of moving it over the road "at least during the present emergency period due to the War." Complainant cited the Commission's decision in *Trucks on Flat Cars.* The Commission dismissed the complaint, holding that the motor carrier would be acting as a carrier vis-a-vis the shipper, and a shipper vis-a-vis the railroad. Citing both *Substituted Freight Service* and *Stones Express*, the Commission stated that this created a situation which was repugnant to the Act.[62]

Again, two years later in a proceeding concerning an application for a certificate to operate as a water common carrier transporting loaded and empty trailers between Norfolk and Baltimore, *Savage Application*, 265 I.C.C. 157 (1947), the Commission reiterated its previous interpretation. The applicant proposed to handle, *inter alia*,

[61] 32 M.C.C. at 527. Again, this is a case cited by the Commission as consistent with its present interpretation of *Substituted Freight Service.* While it is true that in the *Stones Express* decision there was reference to the fact that the shipper was not being informed of the substituted service, the mandate to bring its operations into conformity with the tariff requirements of the Act must have included one of the requirements clearly set forth in *Substituted Freight Service*, viz., that the motor carrier obtain the concurrence of the participating rail carrier.

[62] 263 I.C.C. at 141-42.

trailers of motor common carriers at published rates. As to this the Commission, citing *Substituted Freight Service*, stated that such service would have to be performed under joint service arrangements similar to those in effect for joint motor-rail service.[63]

Similarly, in *Peninsula Truck Lines, Inc.* v. *Puget Sound Nav. Co.*, 292 I.C.C. 157 (1954), the Commission dismissed the complaint by a motor carrier which alleged that a water carrier's refusal to accept its vehicles for transportation while accepting those of another motor carrier was in violation of the Act. It also alleged that the defendant was, in effect, performing a motor carrier service without authority. The Commission dismissed the complaint on the ground that as to part of its operation defendant was an unregulated "ferry" company, and with respect to another portion of the transportation performed between the ports, the service was a joint service which must necessarily be rendered under joint service arrangements, citing *Savage Application* and *Substituted Freight Service*.[64]

As indicated above,[65] the interpretation was reaffirmed and reenforced in *Movement of Highway Trailers by Rail*, 293 I.C.C. 93.

Legislative action has been sought to change this interpretation of the statute. The Presidential Message of April, 1962 sought legislation which would have changed it. Specific bills[66] to carry out the suggestions in the Presi-

[63] 265 I.C.C. at 167.

[64] 292 I.C.C. at 164.

[65] See pp. 38-39, *supra*. Similarly the Commission's enforcement arm, the Bureau of Inquiry and Compliance, had no doubt that a motor carrier could not act as a shipper. After citing an instance where a motor carrier did tender traffic to a railroad through an agent, and wherein it falsely billed the weight and contents of the shipment, and for which the motor carrier was fined $10,000, the Bureau strongly argued the "repugnancy" in a motor carrier's purporting to act as a shipper. (R. 183-85).

[66] S. 3242 and H.R. 11584, 87th Congress; H.R. 4701, 88th Congress.

dential Message were introduced. They were not enacted. In none of the reports of the Executive Departments submitted in support of these bills, nor in any of the hearings, was there any suggestion that this legislation was unnecessary, because the Commission already possessed the power to accomplish this result by rule. The Comptroller General in his report on H.R. 4701 recognized that, if enacted, the bills would alter the prior interpretation of the Commission that one could not act as a common carrier by motor vehicle and a shipper by rail as to the same shipment.[67]

To overcome this clear and unambiguous principle that the Commission lacks the power to reverse its prior interpretation, the Commission cited for its authority a single proceeding. That citation is *Norwegian Nitrogen Co. v. U.S.*, 288 U.S. 294 (1933). That proceeding involved a *refusal* by the court to approve a change in a longstanding consistent administrative practice, which the court said had peculiar weight "when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion. . ." The case holds that an administrative practice "will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful."[68] Without giving any reasons, cogent or otherwise, and without any showing of how the command could be so clear for twenty-five years, and now become doubtful, the majority of the Commission has completely ignored the rule of the *Norwegian Nitrogen* case and enshrined the exception.

In summary, it is clear beyond the possibility of contradiction that, in view of the Commission's longstanding consistent interpretation that one could not act as both a carrier by highway and shipper by rail as to the same

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[67] See Hearings on H.R. 4700 and H.R. 4701 before the House Comm. on Interstate and Foreign Commerce, 88th Cong., 1st Sess., p. 20.

[68] 288 U.S. at 315.

shipment, which interpretation has been both expressly and impliedly sanctioned by Congress, the Commission lacked the power to adopt Rules 2 and 3.

CONCLUSION

The judgment below setting aside and enjoining the enforcement of Rules 2 and 3 should be affirmed.

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APPENDIX

Section 202(c) of the Interstate Commerce Act, 49 U.S.C. 302(c), provides:

> (c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—
>
> (1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;
>
> (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

Section 203(a)(10) of the Interstate Commerce Act, 49 U.S.C. 303(a)(10) provides:

(a) As used in this part—

(10) The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

Sections 203(a)(12), (13), and (14) of the Interstate Commerce Act, 49 U.S.C. 303(a)(12), (13) and (14) provide:

(12) The term "highway" means the roads, highways, streets, and ways in any State.

(13) The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such

transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

Section 206(a)(1) of the Interstate Commerce Act, 49 U.S.C. 306(a)(1) provides:

> (a)(1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations; *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition

requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

Section 217(a) of the Interstate Commerce Act, 49 U.S.C. 317(a) provides:

(a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money

of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff rejected by the Commission shall be void and its use shall be unlawful.

EASTERN RAILROAD APPELLEES

The Baltimore & Ohio Railroad Company
Boston & Maine Company
The Chesapeake & Ohio Railway Company
Erie-Lackawanna Railroad Company
Grand Trunk Western Railroad Company
New York, New Haven and Hartford Railroad Company
Norfolk and Western Railway Company
The Pennsylvania Railroad Company
Reading Company
Western Maryland Railway.

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